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UNITED STATES SUPREME COURT

71 - 466

Elizabeth Mills,

Plaintiff & Appellant

vs.

L. K. Small, M.D.,

Defendant & Appellee.

PETITION FOR CERTIORARI

Elizabeth Mills
701 Sutter St., #45
San Francisco, Calif. 94109

acting in propria persona

IN THE SUPREME COURT
OF THE UNITED STATES

Elizabeth Mills Plaintiff & Appellant vs. L. K. Small, M.D. Defendant & Appellee.	PETITION FOR CERTIORARI

To the Honerable Chief Justice Burger, Honerable Justice Blackmun, Honerable Justice Brennan, Honerable Justice Douglas, Honerable Justice Marshall, Honerable Justice Stewart, and Honerable Justice White:

Petitioner, plaintiff and appellant in the above entitled case, hereby requests a writ of certiorari.

A. Opinions of Courts Below:

Petitioner's case came before the United States Court of Appeals for the Ninth Circuit, which court filed its opinion on August 5, 1971 (see Exhibit I of this Petition). Petitioner filed a Petition for Rehearing on August 18, 1971, and said Petition was denied on August 30, 1971 (see Exhibit II of this Petition).

Said cause also came before the District Court of Appeals of the State of California, First

Appellate District, Division One, which court filed its opinion on May 15, 1971 (see Exhibit III of this Petition). Petitioner petitioned for a hearing in the Supreme Court of the State of California, and they filed an Order "Hearing Denied" on July 8, 1970.

B. Jurisdiction of United States Supreme Court

Judgment was rendered by the United States Court of Appeals for the Ninth Circuit on August 5, 1971 (please note that their ruling as printed by Pernau-Walsh Printing Co. is dated August 3, 1971, but a 5 was pasted over what petitioner assumes is a 3 on the ruling sent out by the court). Petitioner petitioned for a Rehearing on August 18, 1971, and her petition was denied on August 30, 1971.

Petitioner claims jurisdiction pursuant to 28 U.S.C. 1254 (1); and this petition is being filed within the 60 day time limit provided by 28 U.S.C. 2101(b).

C. Questions for Review

1. Whether or not appellant's case, be it a Civil Rights action or a federal question

case, can be removed from the state court to the federal court pursuant to 28 U.S.C. 1441(b).

2. Whether or not Dr. Small is immune for damages.

3. Whether or not California Government Code section 950.2, which was used by the state courts to bar appellant's causes of action is constitutional, and whether or not it is constitutional as applied to appellant's case.

D. Constitutional Provisions Involved

The federal guarantee of the United States Constitution, article V and article XIV(1) that no person shall be deprived the right to life, liberty or property without due process of law.

28 U.S.C. 1331(a) which gives federal courts "original jurisdiction of all civil actions wherein the matter in controversy... arises under the Constitution, laws, or treaties of the United States," and

28 U.S.C. 1441(b) which states:

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties".

42 U.S.C. 1983 which states:

"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

California Government Code section 950.2 (which became law in September 1963):

".. a cause of action against a public employee or former public employee for injury caused from an act or omission <u>in the scope of his employment</u> as a public employee is

barred if an action against the employing public entity for such injury... is barred because of the failure (a) to present a written claim to the public entity or (b) to commence the action within the time specified in Section 945.6".

California Government code section 1981 (the claim requirement at the time complained of):

"Whenever it is claimed that any person has been injured or any property damaged <u>as a result of the negligence or carelessness</u> of any public officer or employee occurring during the course of his service or employment..., within 90 days after the accident has occurred a verified claim for damages shall be presented in writing...".

California Constitution, Article 1§ 13(3) Deering, page 130, and Government Code section 9606, which state that vested rights cannot be barred by subsequent legislation.

E. <u>Statement of Facts:</u>

Appellant, after exhausting her remedies in the state courts, removed this action pursuant

to 28 U.S.C. 1441(b).

Because of a conspiracy appellant was falsely imprisoned in Agnews State Hospital, Agnews, California, and later at Napa State Hospital, Imola, California (she was neither legally admitted nor legally committed), and she was injured by a breach of contract, and numerous tort wrongs.

In July 1954, as part of the conspiracy, appellant was transferred from a hospital in San Mateo County (where she was 1/2 hour or less) to Agnews State Hospital without cause and without an examination; and then, in furtherance of the conspiracy, she was committed by the Superior Court of Alameda County without being in said county.

In this action appellant is seeking damages against defendant, a medical examiner for the County of Alameda in 1954, for aiding and abetting the conspiracy; and for willfully and knowingly certifying to the Alameda Court that he had examined appellant and found that she was physically OK and mentally paranoid, when in fact appellant

was not in Alameda County in July 1954 nor was she ever examined by defendant.

Appellant was discharged from Napa State Hospital on April 17, 1963, and she filed her original complaint in the Superior Court of the State of California in and for the City and County of San Francisco, on March 18, 1966.

F. State Court Proceedings

The trial judge of the Superior Court, State of California, County of Napa, sustained defense's demurrer, and appellant appealed.

The Court of Appeals of the State of California, First Appellate District, ruled on May 15, 1970 that each cause of action was barred by California Government Code sections 911.2, 945.4, 945.6, and 950.2, or for failure to file a timely claim (see Exhibit III).

Appellant petitioned for a Rehearing in the Court of Appeals, and her petition was denied. Appellant then petitioned for a hearing in the Supreme Court of the State of California, and they filed an Order "Hearing Denied" on July 8, 1970.

G. Jurisdiction of Federal Court of First Instance

Appellant claims jurisdiction pursuant to 28 U.S.C. 1441(b):

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties".

This should apply to appellant's case whether it be considered a Civil Rights action, or a federal question case.

H. Reason for Writ

Pursuant to Supreme Court Rule 19(b), petitioner seeks a writ of certiorari for the following reasons:

1. This court's supervision is needed because the Court of Appeals refused to consider material issues of appellant's case:
   a. No consideration has been given to removal (see PR page 2), yet appellant's action is not barred by the statute of limitations if she can remove same from

state court to the federal court, since her original action was filed in the state court within the three year time period.

b. No consideration was given to appellant's argument that she was further deprived her right to due process of law when the state courts barred her causes of action with California Government Code section 950.2 et al, yet per Siler vs. Louisville & N. R., 29 S.Ct. 451, a circuit court has jurisdiction over a state case where there is a federal question, and a federal questions exists where the invalidity of a statute is sought because it violates the Federal Constitution.

2. An important issue of federal law exists, and it should be ruled on, i.e. whether or not Civil Rights actions can be removed from the state to the federal court.

This is especially true in California, since in actions against public entities and/or public employees, the state courts don't understand anything but the 100 days statute

of limitations, while a federal court, when ruling on a Civil Rights action against a public employee in the State of California, will use the three year statute of limitations provided by California Code of Civil Procedure 338.1.

3. There is no justification for immunity, and other courts have held there was no immunity under similar circumstances. See, Scolnick vs. Winston, 219 F.Supp. 836 (15, 16) where an Attorney General and Assistant Attorney General were liable under the Civil Rights Act for conspiring to illegally incarcerate plaintiffs in a mental institution; Delatte vs. Genovese, 273 F.Supp. 654, where a coroner who certified he had examined plaintiff and found him to be mentally ill, when, in fact, he had not examined him, was liable under the Civil Rights Act; and Bauers vs. Heisel, 361 F.2d 581 where the immunity of judges, from which other immunity is derivative, does not extend to acts clearly outside a person's jurisdiction.

I. Conclusion

Wherefore, because material issues of appellant's case have not been ruled on, and to prevent a miscarriage of justice, petitioner respectfully requests a writ of certiorari.

Elizabeth Mills
acting in propria persona

Date: Sept. 29, 1971

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Exhibit I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH MILLS,

Plaintiff-Appellant,

vs.

L. K. SMALL, M.D.,

Defendant-Appellee.

No. 71-1511

[August 3, 1971]

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL, HUFSTEDLER and TRASK,
Circuit Judges

PER CURIAM:

The plaintiff appeals from the district court's dismissal of her in propria persona action charging the defendant with certifying to the Superior Court of Alameda County on July 21, 1954, that he had examined the plaintiff when he had not. The defendant, Dr. Small, was at the time a medical examiner for the Superior Court and acting within the scope of his employment. Plaintiff sought general and exemplary damages.

The district court dismissed upon the grounds that the action was barred by the statute of limitations and that the appellee was immune from liability for the act charged. We affirm.

Although the complaint, filed in October 1970, does not state its basis for federal jurisdiction, we assume it charges a violation of her civil rights under 42 U.S.C. § 1983. That statute contains no limitation period but resort may be had to the California law. A liability "created by statute" must be brought within three years. Cal. Code Civ. P. § 338 (1). As such her

action is barred. *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970); *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962).

In addition, Dr. Small was acting in a quasi-judicial capacity and was immune from liability for damages under 42 U.S.C. § 1983. *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970).

The judgment is affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-10-71—380

Exhibit II

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
AUG 30 1971
Wm. B. Luck, Clerk

ELIZABETH MILLS, Plaintiff-Appellant, vs. L. K. SMALL, M.D., Defendant-Appellee.	)	NO. 71-1511

Before: MERRILL, HUFSTEDLER, and TRASK, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

Exhibit III

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
MAY 15 1970
Court of Appeal 1st App. Dist.
Lindsay L. Dillon, Clerk

ELIZABETH MILLS,

Plaintiff and Appellant,

v.

L. K. SMALL, M.D.,

Defendant and Respondent.

1 Civil 27116

This appeal is taken by plaintiff Elizabeth Mills acting here, as in the superior court, on her own behalf. It is taken from a judgment entered following the sustaining of a demurrer to her complaint without leave to amend. She concedes having advised the court that "she did not wish to amend her complaint."

The complaint filed February 17, 1969, names B. W. Adams, M.D. (now deceased) and L. K. Small, M.D., as defendants.

Its first count alleges the existence of a conspiracy by unnamed persons "in or prior to July 1954" to maliciously and willfully cause her to be transferred from a San Mateo County hospital to Agnews State Hospital, and to be "injured by a breach of contract and tort wrongs enumerated herein" (no further mention of a "contract" is made); that the defendants as Medical Examiners of the County of San Mateo aided and abetted

the conspiracy on July 21, 1954, by falsely representing that they had examined her; that because of the conspiracy she suffered damages; and that her original complaint was filed March 18, 1966, "within three years of the last overt acts of Napa State Hospital" consisting of her discharge on April 17, 1963, furnishing a supply of drugs to her on May 1, 1963, and certain correspondence dated May 3, 1963.

The second count incorporates the principal allegations of the first, adding that on July 21, 1954, defendants certified to the superior court that their examination disclosed plaintiff to be "paranoid" with a tentative diagnosis of "Schyophrenia" (sic); that there had been neither examination, nor hearing, "nor was she provided with counsel to defend herself"; that defendants' fraudulent representations caused her to be falsely and unlawfully detained in state hospitals; and that she "did not discover the Court file on her in Alameda County until December 18, 1967."

Defendant L. K. Small, M.D., demurred to the complaint on the ground that "each cause of action therein contained, is barred by the provisions of Government Code sections 911.2, 945.4, 945.6 and 950.2 and each statutory element therein."

From the complaint it is clear that Dr. Small, at the critical time alleged in the complaint, was a public employee acting within the scope of hi employment as a medical examiner for the superior court and the County of Alameda. As applicable here Government Code section 950.2 provides: " . . . a cause of action against a public employee or former public employee for

injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury."

We now direct our inquiry to whether plaintiff's claim, if made against Dr. Small's superior court or county employer, would be barred.

Government Code section 911.2 as applicable provides:

"A claim relating to a cause of action for death or for injury to person . . . shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action."

And Government Code section 945.4, as relevant, provides:

"[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim

therefor has been presented . . . ."

Even where, as here, the public employee alone is sued, the action is nevertheless barred by the failure to timely make claim on the employing public entity. (Burgdorf v. Funder, 246 Cal.App.2d 443, 447.)

A complaint against a public entity is subject to a general demurrer unless compliance with the provisions of sections 911.2 and 945.4 is alleged. (See Diss v. Eden Township Hospital Dist., 57 Cal.2d 502; Collins v. County of Los Angeles, 241 Cal.App.2d 451; Tietz v. Los Angeles Unified Sch. Dist., 238 Cal.App.2d 905.) The rule is the same in an action against a public employee. (See Burgdorf v. Funder, supra, 246 Cal.App.2d 443, 446.)

Since plaintiff did not allege compliance with the pertinent Government Code provisions, the order sustaining Dr. Small's demurrer was proper and the ensuing judgment was without error.

We note the absence of any allegations tending to excuse or explain plaintiff's statutory noncompliance. She alleges that the "last overt act" of the conspiracy occurred May 3, 1963, since which time she appears not to have been under any restraint or other disability. And her discovery of "the Court file on her in Alameda County" occurred December 18, 1967, fourteen months prior to the filing of her complaint on February 17, 1969.

The judgment is affirmed.

CERTIFIED FOR NONPUBLICATION

Elkington, J.

WE CONCUR:

Holinari, P.J.

Sims, J.